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VIA FACSIMILE NO.: 571-273-8300 (9 pages)
Date: August 12, 2005

Attorney Docket No.: 100718-362 Bei 758-WCG
6713-Dr.Wi-hf

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellants	:	Ghita LANZENDORFER, et al
Serial No.	:	10/025,065
Filed	:	December 19, 2001
For	:	O/W EMULSIONS CONTAINING ONE OR MORE AMMONIUM ACRYLOYLDIMETHYLTAURATE/VINYLPYRROLIDONE COPOLYMERS
Art Unit	:	1617
Examiner	:	Shaojia Anna Jiang

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANTS' BRIEF ON APPEAL PURSUANT TO 37 CFR § 41.37

Sir:

This is an appeal from the final rejection of an Examiner of Art Unit 1617.

1. REAL PARTY IN INTEREST

The instant application is owned by Beiersdorf AG, record owner hereof.

2. RELATED APPEALS AND INTERFERENCES

The undersigned is not aware of any appeals, interferences, reexaminations,

PAGE 1/9 * RCVD AT 8/12/2005 1:24:56 PM [Eastern Daylight Time] * SVR:USPTO-EFXRF-6/24 * DNIS:2738300 * CSID:2128080844 * DURATION (mm-ss):01-56
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infringement actions or the like in any related applications.

3. STATUS OF CLAIMS

The claims pending in this application are claims 1 and 3-8, and all of said claims are on appeal.

4. STATUS OF AMENDMENTS

The last amendment was that filed on October 6, 2004 (by facsimile) and that amendment was entered. A further response was filed on April 11, 2005, but that response did not include any amendments. There are no outstanding amendments.

5. SUMMARY OF THE CLAIMED SUBJECT MATTER

Independent claim 1 relates to a novel cosmetic or dermatological oil-in-water emulsion comprising 0.2% to 0.3% by weight of one or more ammonium acryloyldimethyltaurates/vinylpyrrolidone copolymers (Page 2, lines 19- 26; page 28, Example 2 and page 30, Example 5). Preferred species of the ammonium acryloyldimethyltaurates/vinylpyrrolidone copolymers are available under the trade name Aristoflex® AVC from Clarient GmbH.

The novel emulsions:
have better effectiveness as moisture-donating preparations,
are easier to formulate
better promote skin smoothing
have better care action
are better vehicles for cosmetic and medicinal-dermatololgical active ingredients
have better sensory properties
are more stable against decomposition, and
are more biocompatible than the prior art emulsions (page 3, lines 6-18; page 23, lines 19-23).

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6. GROUNDS FOR REJECTION TO BE REVIEWED ON APPEAL

The grounds for rejection to be reviewed on appeal are

A) The rejection of claims 1, 3 and 6 under 35 USC 103(a) as obvious over Löffler (US 6,489,395).

B) The rejection claims 4, 5, 7 and 8 under 35 USC 103(a) as obvious over Löffler (US 6,489,395) in view of Applicant's so-called admission regarding the prior art in the specification at pages 14-19.

7. ARGUMENTS

A) The rejection of claims 1, 3 and 6 under 35 USC 103(a) as obvious over Löffler (US 6,489,395).

In the Office Action of January 11, 2005, the Examiner withdrew a previous rejection she had made of Appellants' claims as unpatentable under 35 U.S.C. 103(a) over Beerse et al. (6,294,186), because the Examiner recognized that Beerse et al. merely disclosed a composition comprising ammonium acryloyldimethyltaurates/vinylpyrrolidone copolymer (Aristoflex AVC) in amount of 2% wt., but neither taught nor suggested to reduce the amount of Aristoflex AVC in the composition to Appellants' claimed amount of 0.2 to 0.3% .

It was therefore surprising that the Examiner imposed an almost identical new rejection of claims 1, 3 and 6 under 35 U.S.C. 103(a) as obvious over Löffler (US 6,489,395), based on the presence of Examples in Löffler showing the presence of only

0.6-0.7 % wt. of Aristoflex AVC.

The rejection of the present claims over Löffler is no better than the previous rejection over the Beerse reference however, because Löffler merely lists Aristoflex AVC as an ingredient in some examples, but nowhere discloses what it is, what it does, or why it is present. The description is totally silent about acryloyldimethyltaurates/vinylpyrrolidone copolymer (Aristoflex AVC). In the face of this void, there is absolutely no teaching or suggestion to reduce the amount to 0.2-0.3%. For there to be such a suggestion, there would have to at least be some disclosure of the reasons ***why*** Aristoflex was included in the first place, or of what it does. No one would be motivated to "select optimum parameters...to achieve a beneficial effect", as the Examiner contends, if they do not know what beneficial effect there is to be achieved, or what parameter is to be modified. No person reading Löffler would have any idea of what the Aristoflex AVC does in his compositions, and would certainly have no reason to vary his amounts. There is absolutely no suggestion to reduce Loffler's amounts to the specific levels claimed by Appellants. One cannot "optimize" something if one does not know what it is that is to be optimized!

The rejection of claims 1, 3 and 6 under 35 U.S.C. 103(a) as obvious over Löffler (US 6,489,395) should accordingly be REVERSED.

B) **The rejection claims 4, 5, 7 and 8 under 35 USC 103(a) as obvious over Löffler (US 6,489,395) in view of Applicant's so-called admission regarding the prior art in the specification at pages 14-19.**

Claims 4-5 and 7-8 stand rejected under 35 U.S.C. 103(a) as obvious over Löffler (US 6,489,395) in view of what the Examiner refers to as "Applicants' admission regarding the prior art in the specification at page 14-19". The Examiner relies on the so-called "admission" for the addition of dyes, coloring pigments or cosmetic colorants into a cosmetic composition (paragraph bridging pages 5 and 6 of office action of 01/11/05). It is respectfully submitted that any teaching regarding the inclusion of dyes, coloring pigments or cosmetic colorants that the Examiner may find anywhere, whether in the present specification or elsewhere, cannot possibly overcome the inherent deficiencies of the Löffler reference, as discussed above. The rejection of claims 4-5 and 7-8 under 35 U.S.C. 103(a) as obvious over Löffler (US 6,489,395) in view of what the Examiner refers to as "Applicants' admission regarding the prior art in the specification at page 14-19" should therefore be REVERSED.

8. CONCLUSION

Wherefore it is submitted that the final rejection is in error and should be **REVERSED**.

AUTHORIZATION TO CHARGE FEE TO DEPOSIT ACCOUNT

Appellant is:

[ ] a small entity

[X] other than a small entity

It is requested that the fee for the filing of the Brief on Appeal be charged to the undersigned's Deposit Account No. 14-1263.

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Please charge:

[ ] $ 250.00 for small entity

[X] **$500.00 for other than small entity.**

CONDITIONAL PETITION FOR EXTENSION OF TIME

If any extension of time for this response is required, appellant requests that this be considered a petition therefor. Please charge the required Petition fee to Deposit Account No. 14-1263.

ADDITIONAL FEE

Please charge any insufficiency of fees, or credit any excess to our Deposit Account No. 14-1263.

Respectfully submitted,
NORRIS McLAUGHLIN & MARCUS, P.A.

By _____
William C. Gerstenzang
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I hereby certify that this correspondence is being transmitted via facsimile, no. 571-273-8300 to the United States Patent and Trademark Office, addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on August 12, 2005.

By _____
Zsuzsa Schuster
Date August 12, 2005

9. CLAIMS APPENDIX

The claims are appeal read as follows:

1. A cosmetic or dermatological emulsion of the oil-in-water type, comprising
   (i) up to 90% by weight of a water phase,
   (ii) 0.5% to 20% by weight of a lipid phase, based on the total weight of the preparation,
   (iii) up to 10% by weight of one or more emulsifiers, and
   (iv) 0.2% to 0.3% by weight of one or more ammonium acryloyldimethyltaurates/vinylpyrrolidone copolymers.

3. The emulsion as claimed in claim 1, wherein its lipid content is 0.5% to 7.5% by weight.

4. The emulsion as claimed in claim 1, further comprising one or more dyes, coloring pigments, or a combination thereof.

5. The emulsion as claimed in claim 4, wherein the total amount of the dyes and coloring pigments is from 0.1% by weight to 30% by weight based on the total weight of the preparations.

6. The emulsion of claim 2, wherein said lipid content is 5-10% by weight.

7. The emulsion of claim 5, wherein said amount of dyes and coloring pigments is from 0.5 to 15% by weight.

8. The emulsion of claim 7, wherein said amount of dyes and coloring pigments is from 1.0 to 10% by weight.

10. EVIDENCE APPENDIX

No evidence under §§ 1.130, 1.131, or 1.132 has been submitted.

11. RELATED PROCEEDINGS APPENDIX

There have been no decisions rendered by a court or the Board in any proceeding identified pursuant to paragraph (c)(1)(ii) of 37 CFR 41.37